



REPUBLIC OF KENYA



**Mogonchi v Ombiro & another (Criminal Appeal E004 of 2022)
[2024] KEHC 2588 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2588 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E004 OF 2022
TA ODERA, J
FEBRUARY 28, 2024**

BETWEEN

NASHON KEMBERO MOGONCHI APPELLANT

AND

EVANS ONDIEKI OMBIRO 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

*(Being an Appeal from the Ruling in Ogembo Senior Principal Magistrate's
Court, Miscellaneous Criminal Application Number MCCR/MISC/
E059 of 2021 by Hon. C.N. Sindani (PM) delivered on 8th March 2022)*

JUDGMENT

1. The Appellant herein Nashon Kembero Mogonhi, being dissatisfied and aggrieved with the ruling of Hon. C.N. Sindani, Senior Principal Magistrate at Ogembo delivered on 8th March, 2022 in which the application dated 4th November, 2021 was dismissed filed the instant appeal on grounds: -
 - a. That the learned trial magistrate erred in law and fact to have entertained the objection of the 2nd Respondent to the application through the replying affidavit of Vane Mochama since it was ultra vires. The DPPP was merely listed as a 2nd Respondent in order to meet the legal requirements spelt out in Section 28 (2) of the ODPP Act. The DPP's state powers of prosecution do not include contesting private suits initiated by other persons or authorities which are devoid of public interest, but can takeover in accordance to Section 28 (3) of the ODPPP Act and Article 157 (6) (b) of *the Constitution*.
 - b. That the learned trial magistrate erred in law and fact in relying on Section 4 (1) of the Private Prosecution Bill 2007 which states inter alia a person seeking to commence private prosecution to cause a notice of a private prosecution to the Attorney General to which is should be



responded to within 30 days. Failure to which is when a party is to apply to the court for leave” to rule that the application was premature yet the said bill was never enacted by the National Assembly and/or received Presidential assent.

- c. That the learned trial magistrate misdirected himself when he failed to address his first question for determination which he crafted on the following words: The question that now lays before me is whether the Applicant has demonstrated that the prosecuting agencies have refused to prosecute his case and whether the same is demanding.
- d. That the learned trial magistrate erred in law and fact in holding that the Private Prosecution Bill 2007 had the force of law that could be applied to settle a question of law as he did with his second question for termination which he had crafted in the following words: secondly is whether he had exhausted and remedies and or procedures to warrant this court to grant leave for private prosecution.
- e. That the learned trial failed to give a cogent cause and/or reasons while delivering his ruling in spite of clarity in submissions by the Appellant and the 2nd Respondent.
- f. That the learned trial magistrate erred in law and fact when he failed to find that the absence of a title deed is not a bar to prosecution for the twin offences that the 1st Respondent committed on the Appellant’s property because the law requires that there be equal recognition and enforcement of land rights arising under all tenure systems.
- g. That the learned trial magistrate erred in law and fact in the failure to determine whether or not the precedent of terminating the criminal suit against the 1st Respondent due to absence of a title to a property is a threat to the rule of law and a miscarriage of justice.
- h. That the learned trial magistrate erred in law and fact in the failure to determine whether or not the 2nd Respondent had maintained a more than usual and reasonable reticence on various Articles of *the Constitution*, statutes and court precedents in terminating the criminal case No. MCCR/E824/2021 against the 1st Respondent.
- i. That the learned trial magistrate erred in law and fact in the failure to determine whether or not the 2nd Respondent was culpable of biasness and partiality in declining to prosecute the 1st Respondent.
- j. That the learned trial magistrate erred in law and fact in the failure to determine whether or not the 2nd Respondent’s failure and/or refusal to prosecute the 1st Respondent was without reasonable cause.
- k. That the learned trial magistrate erred in law and fact in the failure to determine whether or not serious procedural improprieties were committed prior to discharge of the 1st Respondent by the court.
- l. That the learned trial magistrate erred in law and fact in the failure to determine whether or not there was a clear likelihood of a failure of public and private justice unless he 1st Respondent is prosecuted promptly for the offences.
- m. That the learned trial magistrate erred in law and fact in the failure to determine whether or not the Appellant would suffer a substantial economic loss unless the 1st Respondent is prosecuted to pave way for commensurate compensation for the actual economic loss he occasioned.



- n. That the learned trial magistrate erred in law and fact in the failure to determine whether or not the outcome after the complaint to the 1st Respondent warranted filing of the application for permission to pursue private prosecution of the 1st Respondent.
- o. That the learned trial magistrate erred in law and fact in the failure to determine whether or not the complainants in question essentially turned on limited, private rights.
- p. That the learned trial magistrate erred in law and fact in the failure to determine whether or not the Appellant had a basis for locus standi to pursue private prosecution of the 1st Respondent.
- q. That the learned trial magistrate erred in law and fact in the failure to determine whether or not the Appellant had been motivated, actuated, impelled by malice, political consideration or some ulterior consideration devoid of good faith in filing the application.
- r. That the learned trial magistrate erred in law and fact in failure to protect and promote equal recognition and enforcement of the Appellant's land rights which arise under whatever tenure systems in regard to ownership of the lawful landholding of the portion of the ancestral land.
- s. That the learned trial magistrate erred in law and fact in the failure to determine whether or not there were compelling and/or mitigating reasons barring the appellant to exercise his right to have the dispute between him and the 1st Respondent be resolved by the application of law and be decided in a fair and public hearing before a court.
- t. That the learned trial magistrate misdirected himself when he eschewed the malice, ill-will, biasness and partiality exhibited by the 2nd Respondent in terminating the suit against the 1st Respondent.
- u. That the learned trial magistrate erred in law and fact in the failure to determine whether or not statements by the 1st Respondent and his agents constituted an admission of occupation and use of the appellant's land to undertake unauthorized bricks making activities.
- v. That the learned trial magistrate misdirected himself into declining to grant the Appellant leave to pursue a private prosecution when the 2nd Respondent had made submissions that they were not inclined to re-institute the criminal suit against the 1st Respondent under whatever circumstances in the absence of a title deed to the property.
- w. That the learned trial magistrate misdirected himself in being averse to grant leave to the Appellant to pursue the private prosecution when he had indeed concurred with the Appellant that h had a right to seek private prosecution in matters affecting him broadly personal to him if the DPP does not wish to bring public prosecutions.
- x. That the learned trial magistrate misdirected himself in removing the Appellant from the sea of justice in the failure to permit private prosecution which would have otherwise offered a conclusive and satisfactory resolution of the pending complainants of trespass and malicious damage to property.
- y. That the appeal raises triable and weighty constitutional issues in regard to the conduct of criminal private prosecution and the application of the Criminal Procedure Code and ODPP Act, and case laws developed by the High Court in the conduct of private prosecutions.

2. Reasons Wheeof: the appellant prays: -



- i. That the Honourable Court be pleased to review the ruling and reverse the orders of the trial subordinate court.
 - ii. That the Honourable Court be pleased to exercise its unlimited original jurisdiction to hear and determine the private suit against Evans Ondieki Ombiro, the 1st Respondent herein, for the offences of:
 - a. Trespass contrary to Section 3(1) of the Trespass Act; Cap 294 and
 - b. Malicious damage to property contrary to Section 334 (c) of the Penal Code.
 - iii. That the Honorable Court be pleased to make such further orders that it may deem just and proper.
 - Iv. That costs be in the cause/be provided for.
3. The appellant filed application dated 4.11.21 seeking;
- a. That the Honourable court be pleased to grant the applicant leave to commence private prosecution against Evans Ondieko Ombiro, the 1st respondent herein for the offence of;
 - i. trespass contrary to section 3(1) of the trespass Act
 - ii. malicious damage to property contrary to section 334(c) of the penal code.
4. The application is based on the grounds that the applicant was the complainant in MCCR /E824 of 2021 at Ogembo Chief Magistrate’s Court where the 1st respondent was charged with trespass and malicious damage to property by Director of Public Prosecutions who is the 2nd respondent herein. He said the offences were committed between January 2021 and March 2021 when the 1st respondent entered his land and established a bricks making cottage industry within his tree plantation and severely damaged his trees and degraded the said property. The 2nd respondent has unilaterally taken the decision to terminate the said proceedings on what appellant suspects is reporting the case at Ogembo police station instead of Kenya police station and that the land has not been registered in his name. He accused DDP of Violating Articles 27(1),28,48 and 50(1) and 157 (10) of the Constitution of Kenya and Section 4(c) (5) (1) (a), and (6)(b) of the Director of Public Prosecutions Act. He said that the he lost Kshs. 682,932/= during the commission of the said offences.
5. The appellant filed written submissions dated 4.4.23, he raised the issue of the 1st respondent was charged in criminal case MCCR. E824/2021 at Ogembo Magistrate’s court. Also that the 2nd respondent corruptly, capriciously and biasedly discontinued the prosecution of the 1st respondent without consideration of the pertinent issues. He submitted that he exhausted the public participation mechanism but the case was not resolved satisfactorily and hence he decided to institute private prosecution of the 1st respondent. He is aggrieved by the decision of Hon Sindani which was based on the private prosecution Bill 2017 which was never enacted into law. He further submitted that unless the said orders are reversed his rights under Article 50 (1) of the constitution will be infringed.
6. The appellant submitted that there are only two issues for determination i.e
- a. whether the learned trial magistrate issued illegitimate orders based on a non-existent law.
 - b. whether the learned magistrate prejudiced the Appellant in the failure to comply with Section 169 (1) of the Criminal Procedure Code.



17. The 2nd respondent filed submissions herein and stated that the application for leave to file private prosecution proceeding was made in the lower court, they objected and the court found that the appellant did not meet the threshold set under section 4 of the private prosecutions Bill 2017 and hence this appeal. He submitted that the gist of the ruling was that the due process was not followed. Further that the replying affidavit filed by Vane Mochama a prosecution counsel at Ogembo Court clearly states that the charges of malicious prosecution and trespass met the required threshold to prosecute the case against 1st respondent and that upon the matter being set down for hearing the said counsel pressured the file and noticed that the title deed to the land was not in the file and she asked appellants to avail it without any success. On 31.10.21 the learned prosecutor proceeded to withdraw the case under section 87 A CPC pending awaiting the title deed from appellant. The appellant then jumped the gun and moved the lower court for leave to file private prosecution instead of moving the office DPP under section 89 of the CPC as was held in the case of Raila Odinga vs Proff Saitoti and others (MISC criminal application no. 31 of 1995 and Floriculture International Limited. It was also submitted that the procedure for instituting private prosecution was not in the court of appeal case of Otieno Richard v Republic (2006 (Eklr where the 3 judge bench held ‘ Otieno Clifford Richard v Republic [2006] eKLR, the Court stated that:-

“Section 85 to section 88 of the Criminal Procedure Code deals with ‘Appointment of public prosecutors and conduct of prosecution’. On the other hand, section 89 to section 90 of the Criminal Procedure Code deals with the ‘Institution of proceedings and making of a complaint’. We think that in the case of a private prosecution an application must be first made under section 88(1) of the Criminal Procedure Code for the Magistrate trying the case to grant or refuse to grant permission to the Plaintiff to conduct a private prosecution.”

The duty of the court

7. This is a first appellate court and the duty of this court is to re-evaluate the evidence on record and come on its own independent decision as was held in the case of case of Okeno vs Republic [1972] EA 32).
8. I have carefully re-evaluated the entire evidence of record and the submissions. the issues arising for determination are as follows;
- i. Whether the DPP had powers to withdraw the case in the lower court.
 - ii. Whether the trial court erred by relying on Private Prosecution Bill 2017 in his ruling
 - iii. Whether the failure by the trial magistrate to comply with provisions of section 169 of the CPC was prejudicial to the appellant.
 - iv. What is the procedure to be applied when seeking leave to commence private prosecution?
 - v. Whether the appellant met the threshold of being granted leave to commence private prosecution.
9. On the first issue, on the Powers of the Director of Public Prosecutions, the DPP is the chief Government Prosecutor and he derives his powers from Article 157 of [the constitution](#) of Kenya which provides: -

“157 (6) The Director of Public Prosecutions shall exercise state powers of prosecution and may;-



- a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.
- b) Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority with the permission of the person or authority and
- c) Subject to clause (7) and (8) discontinue at any stage before Judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions under paragraph (b).
- 7) If the discontinuance of any proceedings under clause (6) takes place after the close of the prosecution's case. The defendant shall be acquitted.
- 8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of court.
- 9) The powers of the Director of Public Prosecution may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
- 10) The Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her functions, shall not be under the direction or control of any person or authority.
- 11) In exercising the powers conferred by this Article, the Director of Public Prosecution shall have regard to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.”

10. Section 6 of the Office of the Director of Public Prosecution Act, 2013 provides that:-

“Pursuant to Article 157(10) of *the Constitution*, the Director shall;

- a) Not require the consent of any person or authority for the commencement of criminal proceedings;
- b) Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under *the constitution*, this Act or any other written law and;
- c) Be subject only to *the constitution* and the law.” Section 6 of the Office of the Director of Public Prosecution Act, 2013 provides that:-

“Pursuant to Article 157(10) of *the Constitution*, the Director shall;

- a) Not require the consent of any person or authority for the commencement of criminal proceedings;
- b) Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under *the constitution*, this Act or any other written law and;



c) Be subject only to *the constitution* and the law.”

11. It is clear to me that the DPP has powers under Article 157 of *the constitution* to institute, take over, terminate criminal proceedings and in performing the said duties he must have regard to public interest and avoidance of abuse of legal process. The said section 6 of the DPP Act underpins the independence of the ODPP in performance of its duties.
12. On whether the trial magistrate relied on a non-existent law to dismiss the application filed by the appellant seeking private prosecution, the trial Magistrate cited sections 3 and 4 (1) of the Private Prosecutions Bill 2017 among other reasons for dismissing the application for leave to file private prosecution proceedings. Prosecution conceded that the trial magistrate was in enforcing a Bill which had not been passed as a law. It is trite law that a Bill is a proposed law which is yet to be passed by parliament and it only becomes law upon being passed by parliament and assented to by the president. A Bill is thus not a law and cannot be enforceable in any court of law. I do agree with the appellant that the trial court erred in applying the Bill to the application before him.
13. On whether the learned Magistrate prejudiced the Appellant by the failure to comply with Section 169 (1) of the Criminal Procedure Code, the appellant submitted that the court failed to list issues for determination and dealt with extraneous issues thus prejudicing him. He cited the case *Gourlet v Union of post office Workers and others* [1977] 3 ALL ER 70.

Section 169 of CPC provides that “. Section 169 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) provides as follows:

169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty.

14. It is clear that section 169 of CPC provides that in determination of a criminal case, the presiding officer must list the issues for determination. The trial magistrate did not comply with this. However, the non-compliance does not go to the root of the ruling as no prejudice was occasioned to appellant since this is not a matter of substance and the anomaly is excusable under Article 159 (2) of *the Constitution* of Kenya.

Procedure for commencing Private prosecutions

15. On the procedure for institution of private prosecutions, the appellant submitted that that his rights to be heard are entrenched in Article 50 (1) of *the constitution* further that section 28 (1) of the ODPP Act provides for private prosecution and that section 88 (1) (2) and (3) CPC provides for the procedure to be followed in institution of the said proceedings. 2nd respondent submitted that the procedure is found in section 89 of the CPC as was held in the case *Raila Odinga v Proff Saitoti* (supra)



Section 88(1) of the Criminal Procedure Code. Provides that: -

“A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecution in this behalf shall be entitled to do so without permission section 28, the ODPP Act states as follows with regard to private prosecutions:

- (1) Notwithstanding any provision under this Act or any other written law, any person may institute private prosecution.
- (2) Any person who institutes private prosecution shall, within thirty days of instituting such proceeding, notify the Director in writing of such prosecution.
- (3) In accordance with Article 157 of *the Constitution* and this Act, the Director may undertake, takeover or discontinue any private prosecution.”

16. It is clear that an application for leave to institute private prosecution of criminal matters must be sought before a magistrate who has the duty to consider whether the application meets the threshold for private prosecution. The appellant filed the application before the magistrate’s court seeking leave to institute a private prosecution against the 1st respondent herein, to that extent the appellant was right.
17. On the threshold of private prosecution, upon filing the application for private prosecution the learned magistrate had a duty to examine the application and determine whether the appellant had met the conditions for granting the leave sought. It is upon granting leave to institute private prosecution that section 89 comes into play. In the case of in the case of *Shamsher Kenya Limited v Director of Public Prosecutions A& Another*[2017] eKLR, the Court held that:-

“There is no dispute that any person may be granted leave to institute private prosecution provided that such person is able to establish certain conditions precedent. These conditions were set out in the case of *Floriculture International Limited & others vs. the Attorney General Nairobi High Court Miscellaneous Civil Application No. 114 of 1997* and were reiterated with modifications in *Nairobi High Court Petition No. 339 of 2013 Isaac Oluochier vs. Stephen Kalonzo Musyoka & 217 others*. In this case, Mumbi Ngugi J citing Kuloba J (as he was then) in the *Floriculture Case* held that for a person to be granted leave to institute private prosecution he must establish that he had made a complaint to the police and had accorded reasonable opportunity for the police to investigate the case; that the Director of Public Prosecutions had been seized of the case and declined to institute or conduct criminal proceedings; that failure by the state agencies to prosecute is culpable, unreasonable and without any legally justifiable reason; that unless the suspect is prosecuted there is likelihood that there will be failure of public and private justice; that the person instituting private prosecution has suffered special, exceptional and substantial injury or damage that is personal to him and not motivated by malice, politics or some other ulterior consideration devoid of good faith and finally, that there was demonstrable ground that grave social evil will occur if the police and the Director of Public Prosecutions have acted capriciously, corruptly and in a biased manner that the only remedy is to grant leave to the aggrieved party to institute private prosecution.”

18. In this case it is clear that the appellant reported cases of trespass and malicious damage to property to police and investigations were done and concluded. The 1st respondent was thereafter charged with



the said offenses and arraigned in court in Criminal case MCCR E 824 of 2021 of 2021 Ogembo. The prosecution in their replying affidavit sworn by prosecuting stated that Counsel Vane Mochama to the application for leave to file private prosecution while reviewing the file before being set down for hearing she realized that they did not have the title deed no. Majoge /Bassi /1205 where the appellant claimed that trees were destroyed and 1st resident trespassed into. She proceeded to contact the appellant and sought their he avails the document as ownership of the land goes into the substratum of the case but he did not. I have seen the verifying affidavit dated 3.11.21 filed by appellant in the lower court where he said that the land was registered in the name of his uncle Gwako Okiomeri (deceased) who held the land in trust for his father Stephen Mogonchi Okiomeri who is also deceased. No copy of the said title was annexed to the said affidavit. It was her view that the case was an abuse of the process of the court and the appellant was out to settle personal scores since he was also facing a charge of malicious damage to property against the 1st respondent herein. She said her decision to terminate the case on 13.10.21 under section 87 A of the CPC was based on the law. I have not seen the appellant's response to the said replying affidavit. The court then went ahead and held that the appellant had failed to comply with the provisions of section 4 (1) of the private prosecution Bill. I have already made a finding that the court erred in relying of Bill of parliament which is not the law. A title deed is a crucial piece of evidence in a case of trespass as the complainant must prove ownership of the land which is the scene of crime. In any event, the appellant did not attach a copy of title deed or any ownership documents to his application for leave to commence private prosecution and this supports the averment by DPP that despite being asked to furnish their office with the same he did not comply. Accused was silent on the said issue in the lower court.

19. In The case of Kuria & 3 Others v Attorney General [2002] 2 KLR 69, it was held that: -

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting criminal prosecution otherwise the prosecution will be malicious and actionable.”

In the case of Communications Commission of Kenya (supra), the Court of Appeal stated that: -

“We only wish to add that whereas generally speaking a complainant would ordinarily expect the DPP to prosecute a suspected offender based on the evidence availed to or gathered by the police, the DPP, in exercise of the discretion conferred upon him by the Constitution and statute, cannot be accused of having breached a complainant's legitimate expectation if he chooses not to institute criminal proceedings.”

20. In the case of Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 Others [2013] eKLR

Hon Achode J held that “To argue that a Magistrate's Court must accept every case that is presented before it as a private prosecution, whether or not the institutions charged with the investigation of the alleged offence, and whether or not the institutions charged with the investigation and prosecution of the offenses have exercised their mandate about the alleged offenses that the private prosecutor intends to prosecute, is to invite chaos in the criminal justice system.”

In the same ruling Hon Justice Mumbi Ngugi held that “A private citizen can only institute private prosecutions in those cases where he or she satisfies the Magistrate's Court before whom he or she wishes to carry out the prosecution that there has been a failure by the bodies charged with prosecution



to carry out their mandate. To do so, the private citizen must meet the requirements enunciated in the Floriculture case....”

21. I have re-evaluated the record of the lower court and I find that the intended prosecution was bound to fail in the absence of a title deed or any ownership documents and also that the appellant had no locus standi to press charges on behalf of the estate of deceased since he is not the administrator of the said estate. The DPP thus properly exercised his discretion in withdrawing the case under section 87 A of the CPC for insufficiency of evidence as to the offence trespass and malicious damage to property. The application dated thus did not meet the threshold of private prosecution as laid down in the Floriculture case (supra).
22. The appeal is therefore devoid of merit and I proceed to dismiss it.

DATED, DELIVERED VIRTUALLY VIA TEAMS AND SIGNED AT KISII THIS 28TH DAY OF FEBRUARY 2024.

TERESA ODERA

JUDGE

In the presence of:

Koima for the State

Appellant present in person

Oigo- Court Assistant

